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FILED
JUN 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO: 07- 1444

IN THE
SUPREME COURT OF THE UNITED STATES

SURAIYA MATEEN et al
Petitioners

VS

FRANK DICUS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

PETITIONERS' SUPPLEMENTAL BRIEF

Suraiya Mateen et al,
Petitioners
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CONTENTS OF SUPPLEMENTAL BRIEF

1. Citations of Authority.....i

2. INTRODUCTION 1-3

3. FROW DOCTRINE.....3 -7

4. Fourteenth Amendment.....8

5. Seventh Amendment.....8

6. Reasons for Granting Petition.....10

7. Conclusion.....12

CITATIONS OF AUTHORITY

Page No

Castro v. United Sttes,
540 U.S. 375, 382-383.....8

Days Inns Acquisition Corp. v. Hutchinson.....4
707 So 2d 747 (Fla. Dist. App. 1997),

Frow v. De la Vega, ...1
82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872)

10 James W. Moore, Moore's Federal Practice.....4

Shaughness v. Mezei,
345 U.S. 206, 212 (1953); 2

STAUTES

Federal Rule of Civil Procedure 37(b) & (d)

Federal Rule of Civil Procedure 54(b)

OCGA Section 9-11- 54(b).

SUPPLEMENTAL BRIEF OF PETITIONER

INTRODUCTION

On May 21, 2008, Petitioners have submitted their petition. A Response was due by June 20, 2008, but no brief in Opposition has been filed.

The supplemental brief is being filed to show to the Honorable Court that the respondents had nothing to oppose the petition and also to Cite some new cases in support of the petition.

Respondents chose not to file a response because they could not point to the Honorable Supreme Court any misstatement of fact or law in the petition. They could not object or oppose the consideration of the questions presented by the petitioners.

The Central question presented in this Petition is regarding the direct conflict which the

Court of Appeals of Georgia has created with the applicable decision of this Court in *Frow v. De la Vega, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872)* and also with the decisions of numerous Circuits Courts. Respondents have failed to meet their burden to prove otherwise.

The Second part of the Court of Appeals of Georgia's opinion entered on June 27, 2007, (Page Nos. 4-5,) is the key issue of this petition. The Court of appeals opinion is attached here as Appendix A. The Court of Appeals in this case has departed too far away from the accepted and usual course of judicial proceedings.

At the first instance, the opinion in the case at bar, is in direct conflict with the well established opinion of this court in Frow, (Frow Doctrine).

The Court of Appeal's opinion on Page No. 5 states:

"In the case at bar, the dismissal with prejudice adjudicated the liabilities of only one party. It neither terminated the action nor rendered the default judgment void. The Trail Court did not err in refusing to set aside the default judgment."

This Opinion directly contradicts the Opinion of the Honorable Supreme Court in "Frow":

THE FROW DOCTRINE

In his appeal, Frow contended that the court erred in entering default judgment against him while the case was still pending on the merits as to the other defendants.

The Supreme Court reversed the default judgment against Frow,

Holding:

"If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one

decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike ;the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal." 82 U.S. at 554.

Days Inns Acquisition Corp. v. Hutchinson. 707 So 2d 747 (Fla. Dist. App. 1997), recognized that where relief against one defendant is completely dependent upon liability of co defendant, it is

improper to enter default judgment until liability of co defendant is decided.

Frow involved a claim of a joint tort to defraud the plaintiff of title to a res. To the extent that it holds that there cannot be inconsistent adjudication to joint liability or as to a single res in controversy, this ancient case remains good law.

The result in Frow was clearly mandated by the court's desire to avoid logically inconsistent adjudication as to liability.

Several other circuit courts which are cited in the Petition, follow "Frow Doctrine" which stands for the rule that a default judgment should not be entered against one of several defendants when the theory of recovery is one of true joint liability, such that, as a matter of law, no one defendant may be liable unless all defendants are liable, or no one defendant is relieved unless all are relieved.
Ref: *10 James W. Moore, Moore's Federal Practice*

In the case at bar, respondents filed a joint complaint of alleged fraudulent transfers and conspiracy against all defendants. The allegation against defendant attorney Walrath was that he prepared the documents transferring the properties. Therefore, he was alleged to have played a

fundamental role in this alleged transaction. Liability of Walrath was associated with the liability of all the other defendants. All the defendants were dependant on Walrath for their liability. If the case has been adjudicated on merits against Walrath, How can a default judgment against other defendants sustain?

John Walrath filed a Summary judgment Motion (R-P.Nos. 3038 - 3061). A hearing was scheduled for September 13, 2003. On September 8, 2003, respondents voluntarily dismissed Walrath with prejudice. The case was thus adjudicated on merits.

Accordingly, Frow Doctrine Rule should be strictly followed in this case, and the default judgment against other defendants should be reversed.

The above stated rule which is generally accepted by all Courts is in direct conflict with the Court of Appeals of Georgia's following opinion on (Page No.4):

" appellants' contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor renders void the judgment against the remaining defendants is not supported by Georgia Law."

It has to be noted that the Rules of the constitution of Georgia are framed in accordance with the Rules of the Federal Constitution. OCGA section 9-11-54(b) is in accordance with Federal Rule of Civil Procedure, 54(b) which supports the "Frow Doctrine".

As the opinion of the Court of Appeals here, has departed drastically from the mainstream of American jurisprudence , call for an exercise of this

Court's Supervisory Powers is mandatory.

Secondly, it has long been recognized that the Fifth, Fourteenth and the Seventh Amendments of the Constitution of the United States guarantee the Constitutional rights of due process and jury trial for all the citizens of the United States. See Shaughness v. Mezei, 345 U.S. 206, 212 (1953);

Fourteenth Amendment reads as follows:

"All persons born or naturalized in the United States, ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Seventh Amendment reads as follows:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..."

In the case at bar , the dispute involved the real estate properties worth more than a Million dollars. But, the petitioners were deprived of their day in any court.

In order to restore the integrity of the Constitutional laws and to curtail the discretion of the Trial Courts in misapplying Fed. Rule of Civil Procedure, 37(b) & (d), the grant of this petition is essential.

A large number of the citizens of the United States suffer irreparable harm when the Trial Courts abuse their discretion and erroneously enter default judgments against them. Entry of a default judgment is the harshest sanction which results in involuntary violation of the constitutional laws of guaranteed due process clause.

REASONS FOR GRANTING THE PETITION

1. The Petition should be Granted as the Court of Appeals of Georgia's opinion is in direct conflict with the well established opinion of this court in Frow. Fourteenth Amendment to the United States Constitution, provides Equal Protection of the laws, that "No state shall... deny to any person within its jurisdiction the equal protection of law."

2. The Petition should be granted as the Supreme Court is authorized to curtail the discretionary authority of the trial courts in applying Fed. R. of Civ.Pr. 37(b) & (d). This area of law is badly in need of the United States Supreme Court's Supervisory powers.

3. The Petition should be granted, as the Opinion of the Supreme Court in this case will

provide guidance to the Lower Courts to limit their discretionary authority and avoid striking the answers and entry of default judgments. This will substantially protect the Constitutional laws of Due process, (Amendments Fifth, Seventh and Fourteenth), and will decrease the work load of Appellate Courts to a great extent.

4. If this petition is not granted and the lower courts discretionary authority to strike answers and enter default judgments is not curtailed, then the integrity of the constitutional laws of due process will always remain at jeopardy. The public in general will continue to lose their lives, liberty and property without getting a chance to present their case in any court of law.

5. The Grant of this Petition will show to the lower courts that due consideration should be given to the *pro se* litigants so that they are not deprived of their fundamental rights, *ref Castro v. United Sttes, 540 U.S. 375, 382-383.*

6. The Petition should be granted as it remains unopposed. All the facts presented in the petition are deemed accepted by respondents.

CONCLUSION

In view of the above stated facts, Petitioners respectfully request the Honorable Supreme Court to Grant the Petition or summarily Reverse the Court of Appeals of Georgia's Opinion.

Respectfully submitted this 27th day of July, 2008

Suraiya Mateen
Roohi Faiyaz
Reem Muhammedi

APPENDIX A

FIRST DIVISION
ANDREWS,P.J.,
PHIPPS AND MIKELL, JJ.

Court of Appeals
Of the State of Georgia(Seal)
June 27, 2007

IN THE COURT OF APPEALS OF GEORGIA

A05A1372. MATEEN et al. DICUS
MK - 064

MIKELL , Judge,

In Mateen v. Dicus, the Supreme Court reversed Division I of our opinion in this case, holding that we erred in concluding that we lack jurisdiction to consider two enumerations of error because appellants Suraiya A. Mateen, Roohi Fatima Faiyaz and Reema

Mohammedi failed to include the relevant orders in their notice appeal. Accordingly, our prior judgment as to Division I is vacated and the judgment of the Supreme Court is made the judgment of this court. The Supreme Court remanded the case with direction that we consider the appellants' remaining enumerations on the merits. We do so below.

1. Appellant complain that the trial court erred in adding a party, defendant Amtul Hameed, through publication. Appellant argue that service by publication was unauthorized because "Plaintiffs were very well aware of the party's address." This argument fails for three reasons. First, Hameed is not a party to this appeal, and appellants have no standing to voice a vicarious objection to the sufficiency of service upon another party.

Second, appellants waived the argument by failing to assert it in the trial court. The record reveals that at a motion hearing the court asked defendant Mateen, " are you here to argue defendant Hameed's Motion for.....insufficiency of service of process? Mateen replied "No". The Court stated "Hameed is not [here]. As far as you know, she's in India." Mateen replied "Yes Sir". It is well established that "one cannot complain of a judgment, order, or ruling that his own procedure or conduct procured or aided in causing. Appellant's have waived any right to complain of the method of service upon Hameed.

Third, appellee Dicus complied with OCGA Sec. 9- 11-4(f)(1)(A) in obtaining the order for service by publication. He submitted an affidavit averring that he believed that Hameed resided in India but that he did

not know where she could be found. Pursuant to the statute, the trial court may grant an order permitting service by publication if, among other things, the affidavit is proper. In this case, appellants offered no evidence to contradict the affidavit. Thus, the trial court did not err in ordering service by publication upon Hameed.

2. Appellant contend that the trial court erred in refusing to set aside the default judgment entered against them because Dicus's voluntary dismissal with prejudice of defendant John Walrath rendered the default judgment void. Walrath was the attorney who prepared the documents transferring the properties that were the subject of the fraudulent conveyance action. Appellants' contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor

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renders void the judgment entered against the remaining defendants is not supported by Georgia law. "A voluntary dismissal with prejudice constitutes a final disposition of the underlying action only as far as the parties involved in the voluntary dismissal are concerned.... The effect of a voluntary dismissal does not extend to any party not named therein. Furthermore, pursuant to OCGA sec. 9-11-54(b), an order "which adjudicate fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties." In the case at bar, the dismissal with prejudice adjudicated the liabilities of only one party. It neither terminated the action nor rendered the default judgment void. The Trial Court did not err in refusing to set aside the default judgment.

3. All pending motions filed by appellants are denied.

Judgment affirmed. Andrews, P.J. and Phipps, J., Concur.

Footnotes:

1. 281 Ga. 455(637 SE 2d 377) (2006)
2. Mateen v. Dicus, 275 Ga. App.742, 743 - 744(1) (621 SE2d 487) (2005)
3. 281 Ga at 457. The remainder of our rulings were left undisturbed, and our prior decision is reversed only insofar as it is inconsistent with the Supreme Court's decision.
4. Phillips v. Phillips, 159 Ga. App. 676, 677(2) (285 SE 2d 52) (1981). Accord, Ueal v. AAA Partners in adoption, 269 Ga. App.258, 260 (2)(603 SE2d 672) (2004)
5. (Citations and punctuations omitted.) Parlato v. City of Atlanta, 151. Ga. App. 235, 237 (259 SE2d 217)(1079)
6. Headquarter v. Merrill Lynch, Pierce, Fenner & Smith, 272 Ga.209, 211- 212(2) (528 SE2d508)200 (voluntary dismissal of employee does not bar vicarious liability of employer for employee's tortuous acts unless dismissal is statutorily described as an adjudication on the merits).
7. See Tanaka v. pecqueur, 28 Ga. App. 380, 383(5) (601 SE2d 830)(2004)